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26  
27 **UNITED STATES DISTRICT COURT**  
28 **CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

19 KAMBIZ BATMANGHELICH, on  
20 behalf of himself and all others  
21 similarly situated, and on behalf of the  
22 general public,

23 Plaintiffs,

24 v.

25 SIRIUS XM RADIO, INC., a  
26 Delaware corporation, STREAM  
27 INTERNATIONAL INC., a Delaware  
28 corporation, and DOES 3 through 50,  
inclusive,

Defendants.

**CASE NO.: CV 09-9190 VBF (JCx)**

**PLAINTIFF'S RESPONSE TO  
OBJECTIONS TO CLASS ACTION  
SETTLEMENT**

**DATE:** September 12, 2011

**TIME:** 1:30 P.M.

**COURTROOM:** 9

**JUDGE:** Hon. Valerie Baker Fairbank

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## I. INTRODUCTION

Plaintiff submits this response to objections filed by three class members out of the more than 1.7 million who received individual notice (representing fewer than .00017%). There were just 32 opt-outs. The paucity of objections and opt-out requests to the settlement is notable.

The substantial relief obtained for class members is even more significant – based on claims received through August 19, 2011, approximately 8,411 California class members shall be paid about \$700 each and approximately 7,467 class members from Florida, Maryland, Nevada and New Hampshire shall be paid about \$140 each.<sup>1</sup> All future callers to Defendants will benefit from Defendants’ agreement to disclose that calls to them may be recorded or monitored. Settlement Agreement ¶ 4.

Two of the three objectors – Michelle Melton and Dave Denny – are represented by “professional” objectors’ counsel who have filed “canned” objections to the settlement; these objections closely resemble the objections their attorneys, Darrell Palmer and John Davis, have filed in connection with many other class action settlements.

Most importantly, as discussed herein, all three of the objections lack merit and should be overruled. Each of the objectors have misread (or failed to read) the settlement agreement, which quickly disposes of several of their arguments. Their other arguments, particularly those addressing attorneys’ fees and the named plaintiff’s proposed service payment, duplicate the discussion by Plaintiff in his motion for final approval and fee application and, as a result, add no value or assistance to the Court’s determination.

The absence of any significant objections to the settlement supports final approval, and the nature of the objections themselves underscores the propriety of the

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<sup>1</sup> The claim filing deadline is September 10, 2011. Plaintiff will advise the Court of the tentative total claims and estimated payouts at the final approval hearing.

1 Court's initial determination to preliminarily approve the settlement. Plaintiff's  
 2 motion for final approval and Plaintiff's application for attorneys' fees and costs and  
 3 a modest service payment should be granted.

## 4 **II. THE CLASS OVERWHELMINGLY SUPPORTS THE SETTLEMENT**

5 In deciding whether to approve the proposed settlement, the ultimate question  
 6 for the Court is whether the settlement is "fair, reasonable, and adequate." Fed. R.  
 7 Civ. P. 23(e)(2). "Settlement is the offspring of compromise; the question we address  
 8 is not whether the final product could be prettier, smarter or snazzier, but whether it is  
 9 fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
 10 1027 (9th Cir. 1998).

11 A certain number of objections are to be expected in response to the settlement  
 12 of any class action. *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d  
 13 164, 175 (S.D.N.Y. 2000). A small number of objectors, however, is a strong  
 14 indicator that a settlement is indeed fair and adequate. *Id.*; *Rodriguez v. West*  
 15 *Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) ("The court had discretion to  
 16 find a favorable reaction to the settlement among class members given that, of  
 17 376,301 putative class members to whom notice of the settlement had been sent,  
 18 52,000 submitted claims forms and only fifty-four submitted objections."); *Churchill*  
 19 *Village, L.L.C. v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) (noting  
 20 favorably "that only 45 of the approximately 90,000 notified class members objected  
 21 to the settlement"); *Francisco v. Numismatic Guaranty Corp. of Am.*, 2008 WL  
 22 649124, \*12 (S.D. Fla. 2008) ("A low percentage of objections will confirm the  
 23 reasonableness of a settlement and support its approval."); *Boyd v. Bechtel Corp.*, 485  
 24 F.Supp. 610, 624 (N.D. Cal. 1979) (objections from 16% of the class constituted a  
 25 "persuasive" showing that settlement was adequate). *See generally 2 McLaughlin on*  
 26 *Class Actions* § 6:9 (7th ed.).

27 Here, class member response has been uniformly positive. Only 32 class  
 28 members have requested exclusion and only three have submitted objections. Over

1 15,800 have submitted claims and the settlement payments are substantial –  
 2 especially considering that the class members suffered no actual harm or out-of-  
 3 pocket loss. Such a positive response underscores that the settlement reached in this  
 4 case is a good one – it provides just compensation to class members and has forced  
 5 the Defendants to amend their practices, protecting consumer privacy rights going  
 6 forward.

### 7 **III. THE PROFESSIONAL OBJECTORS: DARRELL PALMER AND** 8 **JOHN DAVIS**

9 Three class members have submitted objections: Edmund Bandas<sup>2</sup> (in pro per),  
 10 Michelle Melton (represented by professional objector Darren Palmer) and Dave  
 11 Denny (represented by professional objector John Davis).

12 Legitimate objectors exercising their rights to object to a settlement play a  
 13 valuable role in ensuring that settlements are fair and adequate, particularly in  
 14 complex cases with complex settlements. However, a growing number of  
 15 unscrupulous attorneys make a living exploiting the right to object to class action  
 16 settlements by filing objections and subsequent appeals for the sole purpose of  
 17 extorting a pay-off.

18 The Federal Judicial Center has warned courts to “[w]atch out ... ‘for canned  
 19 objections filed by professional objectors who seek out class actions to simply extract  
 20 a fee for lodging generic, unhelpful protests.’” Barbara J. Rothstein & Thomas E.  
 21 Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide*  
 22 *for Judges*, at 11 (2005). Courts are further cautioned to be “wary of self-interested  
 23 professional objectors who often present rote objections to class counsel’s fee  
 24 requests and add little or nothing to the fee proceedings.” *Id.* at 24.

25  
 26  
 27 <sup>2</sup> Mr. Bandas’ objection was not properly filed with the Court and was subsequently  
 28 rejected (Docket No. 76). As a result, it is untimely and should not be considered.  
 Plaintiff nevertheless responds to it out of an abundance of caution.

1 United States District Court Judge James M. Rosenbaum described one group  
 2 of professional objectors as “remoras” who were “loose again.” *In re UnitedHealth*  
 3 *Group PSLRA Litig.*, 643 F.Supp.2d 1107, 1108 (D. Minn. 2009). The problem has  
 4 also been discussed by academics:

5 “Class action practice in the United States has developed its own  
 6 cohort of professional objectors: attorneys who enter a case after a  
 7 settlement is announced, manage not only to object to the settlement  
 8 but to intervene as counsel on behalf of a class member, and then  
 9 threaten to disrupt the settlement unless they are given a hefty reward.  
 10 Their threat is not an idle one. As long as they can intervene, they can  
 11 appeal the settlement as of right, and during the appeal process, the  
 12 settlement will be in limbo. Class counsel will not be paid and class  
 13 members will not receive their benefits. The prospect of delaying a  
 14 settlement for months or years by taking an appeal is the realistic  
 15 threat that objectors hold over the heads of the settling parties....”

16 Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 Law  
 17 & Contemp. Probs. 97, 126 n.64 (Autumn 1997).

18 Objections lacking merit hurt the class. As stated by Alba Conte and Herbert  
 19 B. Newberg, 5 *Newberg On Class Actions* § 15:37 (4th ed. 2002): “meritless  
 20 objections tend to delay providing benefits to bona fide and deserving class members  
 21 inasmuch as settlements commonly do not provide for payment of any benefits until  
 22 the judgment entered approving a settlement is final and not subject to further  
 23 appeal.” *See also Devlin v. Scardaletti*, 536 U.S. 1, 23 n.5 (2001) (Scalia, J.,  
 24 dissenting) (observing that professional objectors’ penchant for filing “canned” briefs  
 25 and baseless objections often lead to baseless appeals in the quest for a fee).

26 Here, objector attorney Darrell Palmer<sup>3</sup>, representing purported class member  
 27 Michelle Melton, and objector attorney John Davis<sup>4</sup>, representing purported class

28 <sup>3</sup> Darrell Palmer has filed “canned” objections to proposed settlements in the  
 following cases, among others: *Rodriguez v. West Publishing Corp.*, No. 05-3222  
 (C.D. Cal. Oct. 9, 2007); *In re Enron Sec. Litig.*, No. H-01-3264 (S.D. Tex. Feb. 1,  
 2008); *In re Currency Conversion Fee Antitrust Litig.*, No. 01-md-1409 (S.D.N.Y.  
 Feb. 14, 2008); *Wilson v. Airborne Health, Inc.*, No. 07-cv-770 (C.D. Cal. June 4,

(Footnote Cont’d on Following Page)

1 member Dave Denny, have submitted briefs that do not seek to improve the  
 2 settlement but, rather, as revealed herein, lack merit – duplicating arguments they  
 3 regularly make in objections to class action settlements. Indeed, several arguments  
 4 made by these objectors evidence their failure to even read the settlement agreement.

#### 5 IV. ARGUMENT

##### 6 A. The Objectors Have Not Submitted Evidence of Class Membership

7 Not one of the purported objectors produced adequate evidence of their  
 8 inclusion in the class, such as telephone records. The Court's preliminary approval  
 9 order and the settlement expressly require proof of class membership to be submitted  
 10 in order to file an objection to the settlement, as does California law. Settlement  
 11 Agreement ¶ 34.1; Order Granting Motion for Preliminary Approval of Class Action  
 12 Settlement (Docket No. 65), ¶ 16. *See Rebney v. Wells Fargo Bank*, 220 Cal.App.3d  
 13 1117, 1132 (1990) (only aggrieved parties have standing to challenge class action  
 14 settlement).

15  
 16  
 17 (Footnote Cont'd From Previous Page)

18 2008); *In re General Motors Dex-Cool Gasket Cases*, No. HG03293843 (Alameda  
 19 Super. Ct. Aug. 13, 2008); *Salicido v. Iomedix Cold Int'l SRL*, No. BC 387942 (L.A.  
 20 Super. Ct. Aug. 28, 2009); *Troyk v. Farmers Group, Inc.*, GIC 836844 (S.D. Super.  
 21 Ct. 2009); *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. Sep. 4,  
 22 2009); *In re Int'l Rectifier Corp. Sec. Lit.*, No. 07-cv-02544 (C.D. Cal. Jan. 25, 2010); *In*  
*re Gemalas v. The Dannon Co., Inc.*, No. 1:08-cv-00236 (N.D. Ohio May 24, 2010); *In*  
*re Vitamins Litig.*, MDL No. 1285 (D.D.C. 2010); *Freidman v. 24 Hour Fitness,*  
*USA*, No. CV 06-06282 (C.D. Cal. June 11, 2010); *Hartless v. Clorox Co.*, No. 3:06-  
 cv-02705 (S.D. Cal. Dec. 6, 2010).

23 <sup>4</sup> John Davis has filed objections similar to that filed here in a host of cases, including  
 24 *Greenberg v. ETrade Financial Corporation*, No. BC360152 (L.A. Super. Ct. Sep.  
 25 16, 2009); *In re Visa CheckMaster Money Antitrust Litigation*, No. cv-96-5238  
 26 (E.D.N.Y.); *Hillis v. Equifax*, No. 04-cv-3400 (N.D. Georgia); *In re Enron Corp. Sec.*  
*Litig.*, No. H-01-3624 (S.D. Tex.); *Behr Wood Sealant Cases*, JCCP 4132 & 4138  
 27 (San Joaquin Super. Ct.); *In re Homestore.com, Inc. Sec. Litig.*, No. 01-CV-11115  
 28 (C.D. Cal.); *In re Florida Microsoft Anti-Trust Litig.*, Nos. 3D04-2051, 3D04-1590,  
 3D04-1986 (Dist. Ct. of Appeal Florida); *Campbell v. Airtouch Cellular*, No. GIG  
 751725 (San Diego Sup. Ct.); *Walmart Stores, Inc. v. Visa U.S.A., Inc.*, No. 1:96-cv-  
 05238-JG-JO (E.D.N.Y.); *Rodriguez v. West Publishing Corp.*, No. 05-3222 (C.D.  
 Cal. Oct. 9, 2007).

1 Lacking sufficient evidentiary support for their membership and standing to  
 2 appear, each of the three objections should be stricken or overruled without further  
 3 consideration.

#### 4 **B. The Requested Attorneys' Fees are Reasonable**

5 Each of the objectors argue that the attorneys' fee sought by Class Counsel are  
 6 too high.

##### 7 **1. Bandas Objection**

8 Mr. Bandas fails to offer any law or facts to support his blanket statement that  
 9 the requested fees are "excessive." This boilerplate, unsupported objection should be  
 10 overruled. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378  
 11 (D.D.C. 2002) (rejecting broad, unsupported objections). As discussed in Plaintiff's  
 12 application for fees and below, the proposed fees are reasonable under the applicable  
 13 Ninth Circuit precedent.

##### 14 **2. Melton Objection**

15 Ms. Melton proffers objections to the fee request which have no basis in the  
 16 settlement. She argues the proposed fee "is excessive because it is not based on the  
 17 actual value provided to the Class..." (Melton objection, p. 2, l. 18-19) and that "it  
 18 cannot be ascertained whether Class Counsel's requested 21 percent is either an  
 19 accurate or reasonable percentage until all class members' claims have been tallied."  
 20 (Melton objection, p. 5, l. 2-5). She suggests that the Court should defer its ruling on  
 21 Class Counsel's fee motion until the value of claims (and the total payout to the  
 22 Class) is determined – e.g., until after the September 10, 2011 claims deadline.  
 23 (Melton objection, p. 6, l. 17-20).

24 However, there is no reason for the Court to defer its ruling – the final approval  
 25 hearing is scheduled for September 12, 2011, which is *after the claims deadline*.  
 26 Moreover, *the settlement is non-reversionary – every penny of it will be paid out*  
 27 *regardless of the claims rate*. There are no coupons involved. Both of these  
 28

1 arguments lack any merit and evidence a failure to read the most important terms of  
2 the settlement agreement.

3 Ms. Melton also suggests Class Counsel seeks too large a fee because the  
4 proposed 3.2 multiplier is out-of-range compared to the size of the settlement fund.  
5 The primary basis for her argument is rooted in her misunderstanding of the  
6 settlement structure – that there are coupons involved and the settlement amount will  
7 be based on total claims made (“Thus, this case does not entitle the attorneys to such  
8 a significant and deferential multiplier, *particularly given Objectors’ discussion in*  
9 *Section II(A)* [relating to a coupon settlement and the value of claims made]) (Melton  
10 objection, p. 8, l. 15-18) (emphasis added). Ms. Melton’s argument is therefore  
11 premised upon a misreading of the settlement agreement; her analysis is flawed and  
12 should be rejected.

13 Her simple analysis also ignores Ninth Circuit and Supreme Court precedent  
14 addressing the various factors to be used in assessing a fee request. *See Hensley v.*  
15 *Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor [to consider in awarding  
16 fees] is the degree of success obtained”); *In re Xcel Energy, Inc.*, 364 F.Supp.2d 980,  
17 994 (D. Minn. 2005) (recognizing risk as an important factor in determining fee  
18 award); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at \*7 (S.D. Cal. Aug.  
19 30, 1990) (concluding class counsel should be rewarded for achieving an excellent  
20 settlement in a prompt manner); *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th  
21 Cir. 1995) (recognizing complexity of the case as an important factor in determining  
22 appropriate fee award); *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299  
23 (9th Cir. 1994) (finding that the contingent nature of the case should positively  
24 impact fee award). Plaintiff’s fee application (Docket No. 72, p. 11-17) analyzes  
25 these factors in detail.

26 Put simply, Ms. Melton’s analysis fails to present any law or facts which  
27 persuasively demonstrate that Class Counsel’s requested fee is unreasonable under  
28 the circumstances of this case.

### 3. Denny Objection

Mr. Denny's argument regarding fees merely echoes the discussion presented by Class Counsel in their fee application: the Ninth Circuit permits either a percentage of the fund computation or a lodestar computation plus a multiplier to determine a *reasonable* fee for Class Counsel; the district court is not bound by either approach and should use its discretion to determine what is reasonable under the circumstances. *Hanlon, supra*, 150 F.3d at 1029. Mr. Denny provides no evidence or argument that Class Counsel is requesting an "excessive" fee; he merely iterates the same case law and fee standards cited by Class Counsel.

Indeed, as addressed by Class Counsel in their fee application, the fee requested by Class Counsel – whether analyzed under either the lodestar approach with a multiplier, or the percentage of the fund approach – results in a reasonable fee which is fair to class members and adequately and fairly compensates Class Counsel for their time, risk, and exceptional results achieved. Class Counsel request the Court award attorneys' fees of \$2,000,000, which is 21% of the fund, and represents a 3.2 multiplier of Class Counsel's lodestar.<sup>5</sup> Based on the comprehensive discussion presented in the fee application, this request is fair and reasonable.

#### **C. Claim Forms Are Necessary to Implement the Settlement and Require Only Information Necessary to Process Claims**

Ms. Melton argues the request for private information on claim forms – name, address, phone number, and social security or tax id number – will deter participation. She suggests that "there is no rational basis to request this type of sensitive information other than as a means to dissuade class members from submitting claims." (Melton objection, p. 8, l. 21-27). Mr. Denny suggests that the claims process used in this case was "an unreasonable barrier to recovery." (Denny

<sup>5</sup> Class counsel expects that they will indeed spend in excess of the time estimated working with objectors and responding to objections and, if necessary, any appeals of the final judgment; the final multiplier will likely decrease.

1 objection, p. 9, l. 18-19). Neither objector presents any legal authority in support of  
2 their position and neither of these arguments are persuasive.

3 The settlement creates a non-reversionary fund; unlike some “claims made,  
4 claims paid” settlements where a defendant benefits from a potential reversion,  
5 Defendants here have no interest in limiting the total value of claims because the  
6 entire Settlement Amount will be paid out regardless.

7 Moreover, every required piece of information on the claim form was  
8 necessary to process claims, especially considering that certain information required  
9 to make a claim and determine class membership was solely in the control and  
10 knowledge of class members (and required self-identification):

11 . Class members must submit their name and address to be written and  
12 mailed a settlement check.

13 . Because the settlement checks may have exceeded \$600 (indeed, based  
14 on claims to date, California callers will receive over \$600 each), 26 U.S.C. § 6041(a)  
15 requires that the payments be reported to the Internal Revenue Service on a Form  
16 1099-MISC. This form requires a social security number or taxpayer identification  
17 number. Therefore, it was necessary to request this information from claimants. In  
18 fact, not requesting the information at the time of claim submission would have  
19 created a logistical nightmare in distributing the settlement funds.<sup>6</sup>

20 . With respect to seeking class members’ phone numbers and approximate  
21 dates of their calls, this information was necessary to allow verification of claims in  
22 the event fraudulent claims were suspected. Moreover, that information should not  
23 be difficult for the claimants to provide and, if they had difficulty, they could have  
24 contacted the settlement administrator to discuss their options.

25  
26  
27  
28 <sup>6</sup> Class members particularly sensitive about disclosing this information over the  
internet were permitted to submit a paper claim form.

1           The same is true for requesting from what state each Class Member  
2 telephoned Defendants from – to participate in the settlement, they must have called  
3 while located in a Covered State, otherwise they are not entitled to the protections of  
4 the applicable privacy laws and are not class members. Defendants' records at most  
5 might indicate the area code of the person making the call (assuming it was not  
6 blocked) but cannot indicate what state class members called from. Therefore, self-  
7 identification was necessary for all class members for this element of the claim.  
8 Again, class members should have had no difficulty in providing this information.

9           Finally, Ms. Melton raises concern about transmitting sensitive information  
10 over the internet. While GCG, Inc., the settlement administrator, uses progressive  
11 security measures to ensure the privacy of information transmitted through the  
12 settlement website, any Class Member who requested a paper claim form received  
13 one by mail. Indeed, hundreds of claims were submitted in paper form.

14           The claim forms and claim process were a necessary part of the settlement and  
15 only required the minimum information to validate and pay class member claims.

16           **D. The Notice Was Clear and Complied With Federal Law**

17           Objector Denny contends that the class notice was insufficient for a host of  
18 reasons, each of which is easily disposed of.

19           Notice must be provided to a class in the best way practicable under the  
20 circumstances. Fed. R. Civ. P. 23(c)(2)(B). The notice must clearly and concisely  
21 identify:

- 22           (i) the nature of the action;
- 23           (ii) the definition of the class certified;
- 24           (iii) the class claims, issues, or defenses;
- 25           (iv) that a class member may enter an appearance through an attorney if the
- 26           member so desires;
- 27           (v) that the court will exclude from the class any member who requests
- 28           exclusion;

1 (vi) the time and manner for requesting exclusion; and

2 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

3 Fed. R. Civ. P. 23(c)(2)(B).

4 As discussed by McLaughlin,

5  
6 “The settlement notice does not need to describe every facet  
7 of the settlement, or describe in exhaustive detail those  
8 features it does describe. It must contain enough  
9 information about the settlement and its implications for  
10 participants to enable class members to make an informed  
11 decision about whether to be heard concerning the  
12 settlement or, if allowed, to opt-out.”

13 2 *McLaughlin on Class Actions* § 6:16 (7th ed.). See also *Rodriguez, supra*, 563 F.3d  
14 at 962-63 (setting forth minimal standards for class notice); *Torrissi v. Tucson Elec.*  
15 *Power Co.*, 8 F.3d 1370, 1373-74 (9th Cir. 1993) (same).

16 “Clarity and objectivity are of primary importance in  
17 describing the key elements in the proceedings so that  
18 recipient class members have sufficient information to  
19 make intelligent decisions. *A statement that is too detailed  
20 may be so incomprehensible and overwhelming to average  
21 citizens that they opt out of the suit simply because opting  
22 out is the easiest thing to do.* On the other hand, a notice  
23 that gives too little information may not adequately apprise  
24 members of their rights and alternatives.”

25 3 *Newberg on Class Actions* § 8:39 (4th ed.) (emphasis added).

26 “The standard ... notice required by subdivision (c)(2) must  
27 contain information that a reasonable person would  
28 consider to be material in making an informed, intelligent  
decision of whether to opt out or remain a member of the  
class and be bound by the final judgment. The class  
members need not be made cognizant of ‘every material  
fact’ before mailing of the notice, nor must the notice be  
perfectly correct in form....An overly detailed notice would  
be unduly expensive, confuse class members and  
‘impermissibly encumber their rights to benefit from the  
action.’

1 *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1104-05 (5th Cir.  
2 1977). *See Krzesniak v. Cendent Corp.*, 2007 WL 4468678, \*1 (N.D. Cal. Dec. 17,  
3 2007) (*citing Nissan*).

4 The law requires a clear and concise explanation of the case and class  
5 members' rights with respect thereto; the notice prepared by the parties and approved  
6 by the Court does just that. Each form of notice approved by the Court also directs  
7 class members to the settlement website, which at all times contained the full  
8 settlement agreement and the contact information for the settlement administrator.

9 Mr. Denny argues that the notice fails to define the term "Authorized  
10 Claimant" and does not use a high enough degree of specificity with respect to what  
11 information on the claim form is really necessary to make a claim. In the notice, the  
12 term "Authorized Claimant" was only used to describe how the settlement payments  
13 would be calculated. There was no need for a detailed explanation of the term and,  
14 as explained above, notice need not – and should not – be as comprehensive as the  
15 settlement agreement. It should not be so detailed and lengthy as to deter  
16 participation. It should state all necessary information to advise class members of  
17 their rights and options and the consequences thereof. It should not define every term  
18 of the settlement agreement. The class notice approved by the Court satisfies the  
19 requirements of Rule 23(c)(2)(B).

20 Mr. Denny's argument, in any case, is moot. All class members who submitted  
21 a claim form that has a deficiency that can be corrected will be sent a customized  
22 deficiency letter (indicating specifically any errors on their claim form) and will have  
23 30 days to cure. This will provide these class members with ample opportunity to  
24 understand exactly what information is necessary to submit their claim.

25 **E. Mr. Batmanghelich's Proposed Incentive Payment is Reasonable**

26 Mr. Denny argues the service payment sought by Mr. Batmanghelich is  
27 excessive and his interests are therefore not aligned with absent class members.  
28 Denny has proffered no evidence or law in support of this position.

1 In contrast, Plaintiff, in his application for a service payment, in his personal  
2 declaration, and in the declaration of Kenneth S. Gaines, presents argument and  
3 evidence in support of the award of a modest service payment.

4 The Ninth Circuit supports the award of reasonable service payments.  
5 *Rodriguez v. West Publishing Corp.*, *supra*, 563 F.3d at 958-959 (“Incentive awards  
6 are fairly typical in class action cases.... and are intended to compensate class  
7 representatives for work done on behalf of the class, to make up for financial or  
8 reputational risk undertaken in bringing the action, and, sometimes, to recognize their  
9 willingness to act as a private attorney general.”). “[A]n incentive award is  
10 appropriate if it is necessary to induce an individual to participate in the suit....”  
11 *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (internal quotations omitted).

12 Factors to consider in making such an award include “the actions the plaintiff  
13 has taken to protect the interests of the class, the degree to which the class has  
14 benefitted from those actions, and the amount of time and effort the plaintiff  
15 expended in pursuing the litigation.” *Clark v. American Residential Services LLC*,  
16 175 Cal.App.4th 785, 804 (2009).

17 A California district court articulated a five factor test for judging when  
18 incentive payments should be awarded:

19  
20 “(1) the risk to the class representative in commencing suit,  
21 both financial and otherwise; (2) the notoriety and personal  
22 difficulties encountered by the class representative; (3) the  
23 amount of time and effort spent by the class representative;  
24 (4) the duration of litigation; and (5) the personal benefit (or  
25 lack thereof) enjoyed by the class representative as a result  
26 of the litigation.”

27 *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

28 “In short, the rationale for making enhancement or incentive awards to named  
plaintiffs is that he or she should be compensated for the expense or risk he has

1 incurred in conferring a benefit on other members of the class.” *Clark, supra*, 175  
2 Cal.App.4th at 806-07.

3 As detailed at length in Plaintiff’s application for his service payment, Plaintiff  
4 has contributed time and incurred risk to pursue the claims at issue. He should be  
5 rewarded with a modest service payment for his efforts, yielding the class a  
6 settlement benefit worth nearly \$10 million.

7 While Plaintiff will refrain from duplicating the argument previously  
8 submitted, the facts here clearly support the award of a modest incentive payment  
9 under the applicable standards for the following reasons, among others: 1) the  
10 proposed service payment is about one tenth of one percent of the Common Fund; 2)  
11 eliminating it would yield an additional payment of only about 60 cents per class  
12 member; 3) the service payment *includes* Mr. Batmanghelich’s settlement payment –  
13 he will not receive anything in addition to this payment; 4) Mr. Batmanghelich has  
14 endured this litigation for 2 years and the service payment compensates him at the  
15 rate of about \$416 per month for his efforts; 5) the service payment alone represents a  
16 discount on the value of his individual claims, which are potentially worth up to  
17 \$5,000 per telephone call with Defendants; and 6) class members are receiving an  
18 exceptional result from this settlement – the release of very narrow claims in  
19 exchange for substantial payments is rarely heard of in the context of consumer class  
20 action litigation, especially considering the lack of actual harm sustained by class  
21 members.

#### 22 **F. The Class Definition is Proper**

23 The objection of Mr. Bandas questions the class definition as “uncertain” and  
24 “fail-safe in that it defines the class in terms of an ultimate issue on the merits...”  
25 (Bandas objection, p. 1). These arguments are inaccurate and the objection should be  
26 overruled.

27 “[T]he class definition must be precise, objective, and presently ascertainable.  
28 The requirement that a class be ascertainable by reference to objective criteria is

1 rooted in the underlying purposes of the class action device and the dictates of due  
2 process.” 1 *McLaughlin on Class Actions* § 4:2 (7th ed.)

3 Newberg states:

4 “Definitions ... should avoid criteria that are subjective  
5 (e.g., a plaintiff’s state of mind) or that depend on the merits  
6 (e.g., persons who were discriminated against). Such  
7 definitions frustrate efforts to identify class members,  
8 contravene the policy against considering the merits of a  
9 claim in deciding whether to certify a class, and create  
10 potential problems of manageability. Similarly, objective  
11 terms should be used in defining persons to be excluded  
12 from the class, such as affiliates of the defendants, residents  
13 of particular states in diversity cases, or persons who have  
14 filed their own actions or are members of another class. The  
15 judge should consider whether the definition will serve the  
16 purpose for which the class is certified (i.e., the resolution  
17 of common questions of fact and law in a single  
18 proceeding).”

19 2 *Newberg on Class Actions* § 6:14 (4th ed.) (citing *Manual for Complex Litigation* §  
20 30:14).

21 A carefully pleaded class definition should describe: (1) a common  
22 transactional fact or status predicated on the cause of action; (2) the time span  
23 appropriate to the cause of action; and (3) any appropriate geographical scope. *Id.*

24 The settlement class definition unquestionably meets these criteria. It uses  
25 *objective criteria* to determine class membership. One of the risks involved in this  
26 case arose from the fact that not all calls were recorded by Defendants, and it would  
27 be very difficult to determine who was recorded on a class-wide basis. The  
28 settlement class definition eliminated this risk by requiring only that a class member  
1) be located in a covered state at the time of the applicable call, 2) have made the  
call during a specified time frame, and 3) have failed to be informed that their call  
was being recorded or monitored. These are without doubt objective criteria – class  
member recollection, which in some cases can be checked against Defendants’

1 records, can confirm class membership. The settlement class definition does not  
2 require that the class member's call have been recorded because the class member  
3 would not know whether or not he or she had been recorded, and Defendants' records  
4 did not readily permit the determination of whether a class member had been  
5 recorded.

6 Indeed, the concession by Defendants to leave recording out of the class  
7 definition was an important part of the settlement because it resulted in objective  
8 criteria known to the class members being used to determine *both* class membership  
9 and establish entitlement to a settlement payment. The class definition is narrowly  
10 tailored to encompass only those individuals to whom Defendants potentially face  
11 liability and therefore who are entitled to recover under the settlement.

12 Further, Mr. Bandas is apparently probing for any conceivable deficiency as he  
13 questions what "in" means in the context of the class definition. Its meaning is  
14 obvious – were you physically located "in" a covered state when the relevant phone  
15 call took place? His other proffered interpretations make no sense in light of the clear  
16 definition and the facts of this case. (Bandas objection, p. 1).

17 The settlement class definition is proper and should be upheld.

18 **G. The Settlement Amount is Fair and Adequate and its Apportionment**  
19 **Among Class Members is Fair**

20 Plaintiff has devoted substantial argument in his motion for preliminary  
21 approval and motion for final approval addressing the fairness of the terms of the  
22 settlement, discussions which he need not restate here. Objector Denny contends the  
23 financial relief to class members is inadequate because, based on a 100% recovery  
24 rate for claiming class members, the settlement consideration is about 20% of the  
25 maximum obtainable (\$9.48m v. \$47m). What Mr. Denny fails to understand is that  
26 according to the testimony of Defendants, not all persons who placed calls to  
27 representatives on behalf of Sirius were recorded and it would be very difficult and  
28 time consuming to determine which callers were actually recorded. In fact, the

1 evidence indicated that only around half of the telephone calls were recorded during  
2 the relevant period. Given this evidence, Mr. Denny's assumption that all persons  
3 who submitted settlement claim forms would be entitled to recover from Defendants  
4 if this case proceeded to trial is simply incorrect.

5 Indeed, Mr. Denny attempts to assess the fairness of the settlement in a vacuum  
6 by ignoring the extensive risks Plaintiff and class members faced, both at  
7 certification, on the merits, and post-trial. As previously detailed extensively by  
8 Plaintiff, these risks were substantial and the relief recovered – through arms' length,  
9 hard fought negotiations – represent a substantial recovery on claims for statutory  
10 penalties where there was no actual harm.

11 Mr. Bandas argues a "substantial conflict of interest" exists because non-  
12 California class members will receive smaller settlement payments in light of their  
13 weaker claims. His argument is flawed, however, because California class members  
14 are not being rewarded for their stronger claims, but rather, for their *more valuable*  
15 *claims* which are entirely due to the statutory damages available under the applicable  
16 law.

17 Under the terms of the proposed settlement, California class members are  
18 entitled to an amount up to \$5,000 each, while Class members in other covered states  
19 are entitled to up to \$1,000 each. This allocation reflects the minimum statutory  
20 damages recoverable under the statutes of each of the five states. "Such differences  
21 in settlement value do not, without more, demonstrate conflicting or antagonistic  
22 interests within the class." *In re Pet Food Products Liability Litig.*, 629 F.3d 333,  
23 346 (3d. Cir. 2010). In fact, "varied relief among class with differing claims in class  
24 settlements is not unusual." *Id.*; *see also Petrovic v. Amoco Oil Corp.*, 200 F.3d  
25 1140, 1146 (8th Cir. 1999) ("[A]lmost every settlement will involve different awards  
26 for various class members."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516,  
27 530 (3d Cir. 2004) ("We agree with the District Court that the fact that there may be  
28 variations in the rights and remedies available to injured class members under the

1 various laws of the fifty states in this matter does not defeat commonality and  
 2 predominance.”). *Cf. Hanlon, supra*, 150 F.3d at 1022-1023 (“the idiosyncratic  
 3 differences between state consumer protection laws are not sufficiently substantive to  
 4 predominate over the shared claims”).

5 No conflict is created between Plaintiff, Class Counsel, and Class Members  
 6 despite the varying allocation of settlement payments between Class Members from  
 7 different states. There is simply a difference in maximum damage awards which  
 8 class members from different states could recover under the claims alleged in the  
 9 Action; such a difference in damages does not defeat class certification, nor does the  
 10 settlement’s fair and rational apportionment among class members create a conflict.  
 11 *In re Pet Food Products Liability Litig., supra*, 629 F.3d at 346; 1 *McLaughlin on*  
 12 *Class Actions* § 4:19 (7th ed.) (“[I]f there is a sufficient nucleus of common questions  
 13 concerning liability, the fact that damages will need to be calculated on an individual  
 14 basis does not defeat typicality or otherwise bar class certification.”).

15 The purpose of a settlement is to compromise disputed claims; this settlement  
 16 and its allocation among class members does just that. It represents a fair, rational,  
 17 and reasonable method to allocate settlement funds among Class Members.

#### 18 **H. The Release is not Overly Broad**

19 Mr. Denny objects that the release is overly broad, but never explains how the  
 20 release is overbroad. In fact, the release is narrowly-tailored to the facts of this case  
 21 and the claims asserted herein. It provides that class members are releasing their  
 22 claims against Defendants

23 “which were asserted in the Action or are related to the  
 24 claims asserted in the Action, including, without limitation,  
 25 any and all claims relating to the transactions, actions,  
 26 conduct or events that are the subject of the Action, and any  
 27 and all claims arising out of the institution, prosecution,  
 28 assertion, settlement or resolution of the Action, and any  
 [and] all claims relating to the recording and/or monitoring  
 of telephone calls[.]”

1 Amended Settlement Agreement, § 14.1. Since the scope of the release is limited to  
 2 claims related to the claims asserted in the action, it is fair and reasonable. *See*  
 3 *Sandoval v. Tharaldson Employee Management, Inc.*, 2010 WL 2486346 at \*11  
 4 (C.D. Cal. Jun. 15, 2010). In addition, given that Mr. Denny does not explain how  
 5 the release is overbroad, his objection to the release should be overruled.

6 **I. The Parties Have Made Substantial Efforts to Accept Potentially Defective**  
 7 **Claim Forms**

8 As with any administration with a substantial number of claimants, several  
 9 claims received were defective because they were not completely filled out (e.g.,  
 10 check boxes unmarked, no signature, no social security number). These are curable  
 11 defects. Some submitted claim forms evidenced non-class membership – a “non-  
 12 curable defect” (e.g. not in a covered state at time of call).

13 Every single claimant who submitted a claim form with a curable defect is  
 14 receiving a letter advising them of the defect and providing them with 30 days to cure  
 15 it. Some “defects” – such as those missing the date of call, the telephone number  
 16 from which the call was made, or the Sirius account number – will be accepted with  
 17 potential verification through Defendants’ records.

18 In summary, no legitimate claim will be denied without ample notice to the  
 19 class member to cure any deficiency capable of being cured.

20 **J. Melton’s Request for an Incentive Fee Should be Denied**

21 Mr. Palmer requests that Ms. Melton be awarded an incentive fee of an  
 22 unspecified amount for “her service as a named representative of Class Members in  
 23 this litigation.” No legal authority is provided in support of her request. Ms.  
 24 Melton’s objection has provided no benefit or service to Class Members. The request  
 25 should be denied.

26 \\\

27 \\\

28 \\\

1       **V.    IN THE EVENT THAT OBJECTIONS ARE OVERRULED, THE**  
2       **COURT SHOULD REQUIRE THAT THE OBJECTORS POST A BOND**  
3       **IN ORDER TO APPEAL**

4       In the event that the Court overrules the objections, the Court should require  
5       that the objectors post a bond if they intend to appeal the settlement. The Court has  
6       discretion to require such a bond under Federal Rule of Appellate Procedure 7.  
7       Requiring such as bond is appropriate where, as here, it is unlikely for the objections  
8       to prevail on appeal. *See Wells Fargo Loan Processor Over-Time Pay Litigation*,  
9       2011 WL 3352460 at \*10 (N.D. Cal. Aug. 2, 2011).

10      **VI.   CONCLUSION**

11      The three objections to the settlement lack merit and should be overruled.  
12      Plaintiff's motion for final approval of the settlement and application for attorneys'  
13      fees and costs, plaintiff's service payment, and payment of settlement administration  
14      expenses should be granted.

15      DATED: August 22, 2011

16                      Respectfully submitted,  
17                      GAINES & GAINES,  
18                      A Professional Law Corporation

19                      By: /s/ Kenneth S. Gaines  
20                               KENNETH S. GAINES  
21                               DANIEL F. GAINES  
22                                      Attorneys for Plaintiff Kambiz  
23                                      Batmanghelich and Class Counsel  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

**UNITED STATES DISTRICT COURT OF CALIFORNIA  
CENTRAL DISTRICT**

**CASE NAME: KAMBIZ BATMANGHELICH, on behalf of himself and all others similarly situated, and on behalf of the general public vs. SIRIUS XM RADIO, INC., a Delaware corporation, STREAM INTERNATIONAL INC., a Delaware corporation, and DOES 3 through 50, inclusive, CASE NUMBER: CV 09-9190 VBF(JCx)**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21550 Oxnard Street, Suite 980, Woodland Hills, California 91367

On August 22, 2011, I served the foregoing document(s) described as:

**PLAINTIFF'S RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT**


in this action by placing a true copy thereof in a sealed envelope addressed as follows:

Darrell Palmer  
Janine R. Menhennet  
Law Offices of Darrell Palmer  
603 North Highway 101, Ste A  
Solana Beach, California 92075  
*Attorneys for Objector Michelle Melton*

Edmund F. Bandas  
200 Lake Road, # 1008  
Belton, Texas 76513  
*Objector in pro per*

- ☐ **BY NOTICE OF ELECTRONIC FILING.** The above-listed counsel have consented to electronic service and have been automatically served by the Notice of Electronic Filing, which is automatically generated by CM/ECF at the time said document was filed, and which constitutes service pursuant to FRCP 5(b)(2)(D).
- ☐ **FEDERAL.** I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 22, 2011, at Woodland Hills, California.

  
Wendy A. Shore